

# **Exhibit 4**

To the January 14, 2011  
Declaration of Eric Proshansky

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

SENECA FREE TRADE ASSOCIATION,

Plaintiff,

v.

ERIC HOLDER, et al.,

Defendants.

Civil Action No. \_\_\_\_\_

**DECLARATION OF THOMAS MOLL**

I, Thomas M. Moll, declare as follows:

1. I am an attorney admitted to practice law in the State of New York and am admitted to practice law before the United States Court of Appeals for the Second Circuit and all federal district courts located within the State. I have personal knowledge of the matters stated in this Declaration and, if called as a witness, I could and would testify to them.

2. I am the General Counsel to the Seneca Free Trade Association ("SFTA"). I have held this position since June 2006. In addition to my role as General Counsel to the SFTA, I have also provided legal counsel and representation to many individual Seneca Indian business owners over the past ten or more years.

3. The SFTA is a non-profit organization chartered by the government of the Seneca Nation of Indians ("Seneca Nation"). The Seneca Nation is a federally-recognized Indian Tribe.

**The Seneca People's History of Trading Tobacco**

4. The Seneca People are part of the Six Nations of the Haudenosaunee Confederacy. At one time, the Haudenosaunee lived in and exercised control over more than thirty-five million

acres of land located in what is now the Northeastern United States stretching from the Atlantic Ocean, west to the Mississippi River and south into what is now the Carolinas.

5. The Seneca People have lived in what is now the western part of New York State for more than one thousand years.

6. The private sector economy of the Seneca People has been built upon the many centuries old tobacco trade taking place on and from Seneca Territory. The Seneca People and other North and South American Indian societies domesticated wild tobacco plants long before the arrival of the European colonists. Tobacco was monetized within Indian society and freely traded among Indian communities hundreds of years before these shores were invaded by foreign colonists. Tobacco has played a far more significant role within Indian societies than in any other.

7. There are approximately 8,000 Enrolled Members of the Seneca Nation.

#### **The Seneca Free Trade Association**

8. The SFTA is a non-profit organization chartered by the government of the Seneca Nation of Indians. The SFTA's membership is comprised of hundreds of businesses licensed by the Seneca Nation. The SFTA functions as both an economic development agency and a chamber of commerce, with the ultimate objectives of creating employment opportunities and jobs, protecting existing trade and commerce, and expanding and diversifying the private sector economy of the Seneca People by supporting free enterprise and entrepreneurship.

9. The SFTA is also required by its Charter and By-Laws to facilitate the self-regulation of those individuals and businesses that engage in the retail sale of cigarettes and other tobacco products from Seneca Territory; including facilitating self-regulation of Seneca tobacco retailers

that sell cigarettes and other tobacco products in non-face-to-face transactions. A copy the SFTA's Charter and By-Laws are attached hereto as Exhibit 1.

10. Membership in the SFTA is restricted by its Charter to those Enrolled Members or businesses who hold a current and valid business license issued by the Seneca Nation. A member of the SFTA may be a person or a business entity (Exhibit 1, By-Laws of the Seneca Free Trade Association, Article III Membership, Section 1).

11. The SFTA is authorized by its Charter and By-Laws to engage in advocacy efforts to protect and defend the inherent and sovereign right of its members to exercise their rights of self-determination and to freely pursue and engage in commerce and economic activity within and from the Seneca Nation's Territories.

12. Over the years, I have participated in hundreds of SFTA Board of Directors' meetings and hundreds of meetings with business owners who are Enrolled Members of the Seneca Nation.

13. The Board of Directors of the SFTA has authorized the commencement of this action on behalf of each member of the SFTA.

#### **Seneca Nation Regulatory Efforts**

14. The Seneca Nation licenses all Seneca businesses through its Business Licensing Ordinance. All businesses selling tobacco products over the internet, by mail, telephone or facsimile from within the Seneca Nation must obtain a business license (Seneca Nation of Indians, Business Licensing Ordinance, Section 2-101(A)).

15. The Seneca Nation has its own Import-Export Law. This law includes a comprehensive regulatory, law enforcement, and tracking scheme that governs the importation, exportation, stamping, and sale of all cigarettes and other tobacco products within and from Seneca Territory

(Seneca Nation of Indians Import-Export Law, Section 1.1 Statement of Policy, Section 1.2 Findings, Section 1.3 Purpose, Section 1.19 Enforcement and Section 2.3 Powers; Penalties; Procedures).

16. Seneca Nation stamping agents affix a unique Seneca Nation stamp that is both encrypted and coded to each pack of cigarettes sold by licensed Seneca businesses (Seneca Nation of Indians, Import-Export Law, Section 1.7 Import Stamps on Tobacco Products).

17. The Seneca Nation's government receives an administrative fee of \$0.75 cents per carton and thus derives substantial revenues from each carton of cigarettes and other tobacco products sold from its Territories. These revenues are in turn used to fund health, education and welfare programs for the Seneca People (Seneca Nation of Indians, Import-Export Law, Section 1.2(a) and (b) Findings, Section 1.3 Purpose, Section 1.6 Import Fee on Tobacco Products, and Section 1.21 Fee Allocation).

18. In my role as General Counsel to SFTA, I have conducted numerous educational seminars for licensed Seneca tobacco retailers on the subject of age verification protocols in non-face-to-face transactions (sales made online, by telephone, fax or mail).

19. I also have considerable experience drafting and enforcing age verification protocols for many Seneca retailers. For example, I have prepared age and address verification forms that are to be used by SFTA members. A copy of these forms are attached hereto as Exhibit 2.

20. Moreover, as General Counsel, it is my responsibility to continue to monitor the future development of age verification solutions and to continue to disseminate updated best practices and protocols to Seneca tobacco retailers. In the areas of age verification, underage tobacco sales, and online safety, I regularly review reports and/or recommendations issued by the Federal

Trade Commission, the Internet Safety Technical Task Force, the Family Online Safety Institute, the Children's Charities Coalition on Internet Safety, and the Safer Internet Forum.

21. As a matter of both social policy and responsible retailing, the SFTA mandates that all Seneca retailers take all reasonable steps to verify that the person purchasing tobacco products is an adult. As a matter of social policy, the government of the Seneca Nation of Indians discourages adolescent smoking.

22. As a matter of law, the Seneca Nation prohibits the sale of tobacco products to minors. On September 18, 2004, the Seneca Nation adopted new and comprehensive regulations specific to the sale of tobacco products by licensed Seneca retailers; these regulations are part of the Seneca Nation of Indians Business Code titled Subpart 2-400: Regulations Specific to the Sale of Tobacco Products. Among other things, these comprehensive regulations require age verification for all purchasers of cigarettes and tobacco products sold from Seneca Territory. All licensed Seneca tobacco retailers, including those selling tobacco online, by telephone, fax and mail, must comply with the Seneca Nation's age verification procedures. A copy of the Seneca Nation's Tribal Council Resolution adopting subpart 2-400 – Regulations Specific to the Sale of Tobacco Products, as part of the Seneca Nation Business Code is attached hereto as Exhibit 3.

23. The Seneca Nation's Import-Export Law also prohibits the sale of tobacco products to any person under the age of eighteen (18) (Seneca Nation of Indians, Import-Export Law, Section 1.18 Prohibited Transactions).

24. In addition to the comprehensive regulations prohibiting the sale of cigarettes to minors, Seneca retailers sell cigarettes only by the carton and generally no less than two cartons per transaction. Because of the expense involved, this two carton requirement is an additional deterrent to underage cigarette sales. All reliable evidence suggests that minors purchase

cigarettes one pack at a time, not by the carton (*see* Ribisl, K.M., *The Potential of the Internet as a Medium to Encourage and Discourage Youth Tobacco Use*, Tob. Control 2003; 12; 48-59, p. 151).

25. The Seneca Nation and the Seneca Nation's Import-Export Commission have worked cooperatively in the past with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the United States Postal Service, and the New York State Department of Taxation and Finance to prosecute illegal traffickers of cigarettes.

26. In a letter dated May 12, 2009, the ATF Special Agent in Charge for New York stated:

On behalf of the Bureau of Alcohol, Tobacco, Firearms and Explosives, New York Field Division, please accept my gratitude for the assistance and support recently provided by the Seneca Nation of Indians to help curtail illegal cigarette trafficking.

As a result of the Seneca Nation's cooperative efforts with ATF, several investigations into illicit cigarette trafficking have been initiated and are now being prosecuted. The assistance provided thus far has been invaluable, and we recognize the efforts made by the Seneca Nation to curtail illegal cigarette distribution.

(Letter from Ronald B. Turk, New York Field Division Special Agent in Charge, U.S. Bureau of Alcohol, Tobacco, Firearms & Explosives to the Seneca Nation of Indians, May 12, 2009).

#### **The Tobacco-Based Economy in Seneca Territory**

27. The Seneca Nation's cigarette and tobacco economy is the predominant source of private sector economic activity and employment within Seneca Territory. It is also a vital source of economic activity benefiting the neighboring communities of Western New York State.

28. The Seneca Nation's tobacco economy has vastly improved the socioeconomic conditions of the Seneca People. Despite this improvement, the reality is that economic conditions within the Seneca Nation are substantially below the economic conditions of its state neighbors, New York, Ohio and Pennsylvania. For example, based on 2000 census data, the

average Seneca Indian earned \$14,492 per year, compared to the average New York citizen who earned \$23,389 (U.S. Census Bureau, American FactFinder<sup>1</sup>).

29. Because the Seneca Nation's Territories are geographically remote and impoverished, the Seneca People do not have a wide array of employment choices. Internet/mail-based tobacco businesses are one of the few successful enterprises on Seneca Territory.

### **Effect of the PACT Act**

30. The Prevent All Cigarette Trafficking Act of 2009 ("PACT Act"), Public Law No. 111-154, will devastate the sovereignty-protected tobacco commerce of the Seneca People, in particular because of the prohibition against the use of the U.S. mails for cigarettes and smokeless tobacco products.

31. The Seneca Nation's private sector tobacco economy is anchored by licensed Seneca businesses that deliver tobacco products via the United States Postal Service ("USPS") to adult consumers located across the United States. In 2005 and early 2006, Federal Express, UPS and DHL entered into agreements with the State of New York to discontinue the delivery of cigarettes and smokeless tobacco products. These agreements have been enshrined in the PACT Act Section 2A(d)(3)(B)(ii). This directly affected all licensed Seneca businesses. This also means that the USPS is the exclusive delivery method for all licensed Seneca businesses. Seneca businesses have been attempting to obtain other delivery services to ship their tobacco products to at least a subset of their customers, but the delivery service requirements of the PACT Act have imposed another substantial hurdle in this effort to obtain a reliable and effective shipping

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<sup>1</sup> [http://factfinder.census.gov/servlet/DTTable?\\_bm=y&-context=dt&-reg=DEC\\_2000\\_SFAIAN\\_PCT130:001|08E&-ds\\_name=DEC\\_2000\\_SFAIAN&-CONTEXT=dt&-mt\\_name=DEC\\_2000\\_SFAIAN\\_PCT130&-tree\\_id=406&-redoLog=false&-all\\_geo\\_types=N&-geo\\_id=04000US36&-search\\_results=01000US&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-reg=DEC_2000_SFAIAN_PCT130:001|08E&-ds_name=DEC_2000_SFAIAN&-CONTEXT=dt&-mt_name=DEC_2000_SFAIAN_PCT130&-tree_id=406&-redoLog=false&-all_geo_types=N&-geo_id=04000US36&-search_results=01000US&-format=&-_lang=en)

method. Because of the difficulty of trying to prepay excise taxes, particularly in states that do not require or have established procedures to collect the tax in advance, and because of the threat of criminal prosecution for acts that are not sufficiently defined to allow businesses and common carriers to know what is illegal, the SFTA members are having a nearly impossible time obtaining alternate shipping arrangements even to a small subset of customers in a limited number of states.

32. All Seneca Territories are located within the borders of the far western portion of New York State, near Lake Erie. The region is rural and geographically remote. For example, the largest city near the Allegany Territory is Buffalo, New York, which is over 60 miles away. Rochester, New York, is over 120 miles away.

33. A federally sanctioned ban on mailing cigarettes and smokeless tobacco products through the USPS will devastate the Seneca Nation's cigarette and tobacco economy. The effects of this legislation on the Enrolled Members of the Seneca Nation will be immediately catastrophic and widespread, as described in more detail below.

34. The negative effects of this legislation will not be limited to Seneca businesses that sell cigarettes and smokeless tobacco products over the Internet, by mail, telephone or fax. The elimination of the dominant segment of the Seneca Nation's private sector economy will ultimately lead to catastrophic consequences for the entire Seneca economy and will also undermine the fiscal stability of many social programs benefiting the Seneca People.

35. Based on my review of data collected by the SFTA, the Seneca Nation's Import-Export Commission, and by the Seneca Nation's Business Licensing Department, at present there are no fewer than 61 licensed Seneca businesses located on Seneca Territory that rely entirely on the USPS to deliver tobacco products to their customers. In addition, there are no fewer than 80

other licensed Seneca businesses operating on Seneca Territory that rely predominantly on the USPS to deliver tobacco products to their customers. These 80-plus businesses also have a small brick and mortar presence on Territory selling tobacco directly to consumers in face-to-face transactions. Thus, in total, there are over 140 licensed businesses that rely exclusively or predominantly on the USPS to deliver cigarettes and smokeless tobacco products to their adult customers.

36. Seneca Nation law requires licensed Seneca retailers to use “the most effective measures available from the United States Postal Service for ensuring that the recipient of the package is at or above the legal minimum purchase age...” (Seneca Nation of Indians, Business Code, Subpart 2-400, Regulations Specific to the Sale of Tobacco Products; 2-404, Indirect Sales of Tobacco Products by Retailers).

37. On November 12, 2009, the SFTA passed Resolutions that were intended to enhance the Seneca Nation’s age verification procedures through the USPS; the SFTA’s Resolutions required SFTA members to “utilize the USPS “Restricted Delivery” option when sending an initial tobacco products order to a new customer”. “Restricted Delivery” is an “Extra Services” option for USPS Express Mail. The USPS charges a fee of \$4.50 per piece for this service in addition to other postage and fees. The “Restricted Delivery” service offered by the USPS permits a mailer to direct delivery only to an adult addressee.

38. The size of the businesses that ship tobacco products via the USPS ranges from companies employing more than 110 employees to small family-operated businesses employing just two people. These businesses employ both Seneca and non-Seneca employees.

39. The three largest Seneca tobacco businesses employ, in total, more than 310 employees. Based on a sampling I conducted over the past four months, on average, most other Seneca

tobacco businesses employ between 12-20 people. There are many businesses that employ substantially more personnel than this range and there are also a handful of businesses that employ fewer personnel than this range. Based on my research, the smallest business I found had two employees.

40. In addition to devastating the Seneca businesses that rely on the USPS to deliver all or the vast majority of their tobacco sales (some sales are made at brick and mortar stores to customers who are physically present at the store), the PACT Act will directly impact Seneca wholesalers, distributors and stamping agents. These businesses will be immediately impacted by the crushing decline in retail consumption caused by the elimination of Seneca businesses relying on U.S. mail delivery. Approximately 80% of all retail tobacco sales within Seneca Territory are made by licensed Seneca businesses that rely on the U.S. mail system for delivery.

41. The reality is that many (perhaps most) licensed Seneca retailers, wholesalers, distributors and stamping agents will also be forced to close their doors. For example, many of the 19 licensed Seneca tobacco wholesalers will be forced to close their doors in the immediate future and their employees will also lose their jobs. Those Seneca tobacco-related businesses fortunate enough to remain open will no longer enjoy their pre-PACT Act buying power. Simply stated, reduced volume translates to reduced buying power. Unfortunately, the surviving Seneca wholesalers, distributors and stamping agents will end up purchasing their tobacco products at a much higher price point from suppliers and manufacturers. This resulting loss in buying power will result in higher wholesale tobacco costs to Seneca brick and mortar retailers. Consequently, these retailers will start to lose their competitive advantage over off-Territory, non-Seneca convenience stores.

42. I have personal knowledge that many SFTA members have already shut down, or are in the process of shutting down because of the PACT Act.

43. Many Seneca mail order business owners have tried to diversify their business holdings to sell other products aside from tobacco. In fact, many of these same Seneca mail order business owners are currently evaluating new non-tobacco related business opportunities that might ultimately benefit the entire Western New York region. Unfortunately, most, if not all of these new opportunities will wither on the vine if these Seneca business owners suddenly lose the cash flow generated by their mail order tobacco businesses.

44. Based on the above scenario, the loss of the USPS as the only delivery option will directly impact thousands of jobs in the next few days, as Seneca businesses, who can no longer deliver product because of the PACT Act's nonmailability provisions taking effect June 29<sup>th</sup>, begin to shut their doors or significantly curtail their operations. Given the fragile state of the Seneca Nation's economy and the economy in Western New York, most of the thousands of workers laid off from their jobs will have no viable alternative employment opportunities. I believe it is likely that 3,000 or more jobs on Seneca Territory will be lost as a direct result of the prohibition on using the USPS to mail cigarettes and smokeless tobacco products to adult consumers.

45. In addition, if cigarettes and smokeless tobacco products cannot be mailed via the USPS, indirect job losses are sure to result from the virtual collapse of the Seneca Nation's cigarette and tobacco economy. For example, the overall impact will be felt by non-Indian lawyers like myself, accountants, marketing consultants, advertisers, postal delivery personnel, internet service providers, and the countless non-Seneca vendors that provide services to Seneca mail order tobacco businesses. In addition, numerous Seneca Nation members have contracting and

other businesses that will certainly see a massive decline in demand if the tobacco industry collapses within the Seneca Nation. Finally, I have not attempted to quantify the effects on the Seneca Nation's social welfare programs that are funded in substantial part by cigarette and smokeless tobacco revenues. The revenues from the fees generated in accordance with the provisions of the Seneca Nation's Import-Export Law are the largest source of revenue derived from the private sector that support the Seneca Nation's critical social welfare programs. The effects on those social welfare programs, such as health care and education, will be devastating and will have widespread impact among all Enrolled Members of the Seneca Nation.

46. Most, if not all, of the retail tobacco businesses represented by the SFTA have no physical presence outside of the Territories of the Seneca Nation nor do these businesses have company vehicles that deliver cigarettes or tobacco products to customers residing outside of the Seneca Nation's Territories. In fact, many of these businesses have limited to no, contact with most of the fifty states aside from a telephone call received from the adult consumer and limited shipments of tobacco products to adult consumers. These businesses do not solicit sales in these states.

47. Many, if not most, SFTA members do not maintain interactive websites and their only contact with most states are limited telephone calls from consumers and a few shipments of cigarettes to adult consumers. Other SFTA members have websites, but target no advertising or solicitations at particular states, and their only contact with many states is limited shipments of tobacco products to adult consumers in the state.

I declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the foregoing is true and accurate. Executed on this 30<sup>th</sup> day of June, 2010.

/s/ Thomas M. Moll  
Thomas M. Moll